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Supreme Court of the United States

October Term, 1974

No. 73-7031

JESSE THURMAN FOWLER,

Petitioner,

v.

STATE OF NORTH CAROLINA.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS *AMICUS CURIAE*

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This brief of the National Alliance Against Racist and Political Repression (the Alliance) as *Amicus curiae* in support of petitioner is filed with the written consents of the parties which have been filed with the Clerk.

THE INTEREST OF THE AMICUS CURIAE

The Alliance, founded in 1973, is a multiracial organization composed of local branches, affiliated national organizations and individual members throughout the United States. Its purpose is to work for the elimination

of racist and political repression from our national life by means of activity in the fields of education, legislation and legal defense. It is particularly concerned with manifestations of racism in the criminal process and the penal system. From its inception, it has opposed the death penalty both as cruel and unusual punishment and because, as applied, it discriminates against Blacks, persons of Latin-American origin, Asians, Native Americans and the poor.

The Alliance has designated North Carolina for special attention. For it believes that the state, once regarded as an exemplar of the "New South," is today the scene of repressive practices more comprehensive in nature than in any other area of the country. This is exemplified by the act of judicial legislation on the part of the Supreme Court of North Carolina in reinstating mandatory death sentences in the state in 1973, and by the fact that of some 185 persons under sentence of death in the United States as of November 29, 1974,[1] 65 are on death row in North Carolina, and that of the latter, 40 are Black and 5 are Native Americans.[2]

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1. Information supplied by NAACP Legal Defense and Educational Fund, Inc.

2. All data in this brief with respect to the present inmates of death row in North Carolina has been compiled from information furnished the Alliance by the North Carolina Department of Correction.

ARGUMENT

THE STATUTE UNDER WHICH PETITIONER WAS SENTENCED VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS FOR THE REASON THAT CAPITAL PUNISHMENT, AS IMPOSED AND EXECUTED UNDER A STATUTE MAKING DEATH MANDATORY FOR MURDER, DISCRIMINATES AGAINST BLACKS.

Capital punishment is cruel and unusual in the constitutional sense or denies the equal protection of the laws if it is imposed and executed in a manner that discriminates against Blacks or other racial minorities or the poor.[3] This was common ground for seven of the Justices in *Furman v. Georgia*, 408 U.S. 238, 256-57 (opinion of Justice Douglas), 310 (opinion of Justice Stewart), 364-66 (opinion of Justice Marshall), 389, n. 12 and 448-50 (opinions of the Chief Justice and Justice Powell, in each of which the other three dissenting Justices joined).[4]

The North Carolina statute under which petitioner, a Black, was sentenced and which, as construed by the Supreme Court of that State, made the death penalty mandatory for murder is unconstitutional because, as applied, it violates this principle of non-discrimination.

In what follows we show, first, that there is a gross disproportion of Blacks among those sentenced and executed for murder in North Carolina and throughout the United States. We then examine the causes of the

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3. The grant of certiorari to consider the constitutionality of petitioner's death sentence under "the Eighth or Fourteenth Amendment" (pet. for cert., p. 2) includes the equal protection question.

4. Justices Brennan and White did not reach this issue.

disproportion and show that each of them is rooted in racial discrimination. We further show that such discrimination occurs without significant difference whether the death sentence is mandatory or is discretionary with the jury.

We are convinced that capital punishment, as imposed and executed, likewise discriminates against other racial minorities and the poor. But since, as to them, the available statistical evidence is inadequate,[5] we confine the demonstration to Blacks.

A. The disproportion of Blacks among those on whom the death sentence is imposed and executed.

It is indisputable that the proportion of Blacks among persons executed for murder has been many times larger than their relative number in the population. This is the case for the United States as a whole, for the South, and for North Carolina. In the period from 1930 to the 1967 moratorium, Blacks never constituted more than 11.1% of the nation's population, 24.7% of that in the South and 29% in North Carolina.[6] Yet, of all those executed for murder in the same time span, Blacks constituted 48.8% for the United States, 67.5% for the South and 71.9% for North Carolina.[7]

5. E.g., the official prisoner statistics include persons of Latin American origin among "whites."

6. Percentages from U.S. Census of Population, 1970, and for the South prior to 1960, from Historical Statistics of the United States, Colonial Times to 1957. The per cent of Blacks in the U.S. population increased from 9.7 % in 1930 to 11.1 % in 1970. In the South, it decreased from 24.7 % to 19.9 % in the same period. In North Carolina, the decrease was from 29 % to 22.2 %. *Ibid.*

7. Percentages from National Prisoner Statistics, No. 46, Capital Punishment, 1930-1970 (1971), hereafter cited as "Prisoner Statistics," Table 4, pp. 12-13. The numbers of Blacks on which the percentages were calculated were 1630 for the U.S., 1231 for the South and 149 for North Carolina. The percent of Blacks among those executed for all crimes is considerably higher than for murder alone – 53.5 % for the U.S., 71.9 % for the South and 75.7 % for North Carolina. The difference results from the very high percent of Blacks among those executed for rape in the South – 89.8 % for the region and 87.2 % for North Carolina. *Ibid*

The dissenting Justices in *Furman* suggested (pp. 390, n. 12, and 450) that this 37 year overview does not reflect what was assumed to be a different contemporary pattern resulting from the ban on systematic exclusion of Blacks from jury service and enforced segregation in the South. A closer look at the figures, however, establishes that this assumption is groundless and that the gross disproportion in the number of Blacks executed for murder persisted without substantial change throughout the 37 year period preceding the 1967 moratorium. This appears from the following table showing the per cent of Blacks among those executed for murder in the United States, the South and North Carolina for each decade since 1930:

	U.S.[8]	South[9]	N.C.[10]
1930-39	45.4[11] (687)	69 (486)	70 (75)
1940-49	56 (595)	71.7 (387)	72 (58)
1950-59	46.6 (280)	63.1 (188)	64 (9)
1960-67	43.9 (68)	60.8 (45)	---

8. Prisoner Statistics, Table 1, p. 8.

9. Bowers, Executions in America (1974), hereafter cited as "Bowers", Table 2-6, p. 57. The figures are for non-whites and include 4 American Indians and 22 Mexican-Americans.

10. Compiled from data in Bowers, Appendix A, pp. 200, 319-31 which list no executions for murder subsequent to 1957.

11. Figures in parentheses denote the number of Blacks executed. There are discrepancies between the number of executions reported in Prisoner Statistics and in the data employed by Bowers. But these do not significantly affect the percentages shown in the table. See Bowers, pp. 64-68. Prisoner Statistics does not publish a state or regional breakdown of its figures for executions of Blacks by years.

These figures reveal a dramatic decline in the number of executions in the 50's and 60's. But they demonstrate that the per cent of Blacks among those executed remained substantially constant during each of the four decades. The slight decline in the percentages shown for the South and North Carolina in the last two decades reflects the out-migration of Blacks during that period, not the factors alluded to in the *Furman* dissents. See Bowers, op. cit., p. 58, and n. 6, *supra*.

The conclusion that the disproportion in the number of Blacks sentenced to death for murder has not declined in recent years is confirmed by the racial composition of prisoners who in 1970 were on death row for murder, as shown in the following table:[12]

	Total	Non-white	% Non-white
U.S.	517	252	48
South	228	134	58.7
N.C.	10	6	60

A similar disproportion is evident among the 224 persons who were sentenced to death in the United States in 1969-1970 (201 for murder). Of these, 107 or 47.8% were Black.[13]

Finally, as of November 29, 1974, approximately 185 persons were on death row in the United States, having been sentenced subsequent to the decision in *Furman*. Of

12. Prisoner Statistics, Table 13a, p. 46. The table does not list Blacks separately, but the number of other "non whites" — i.e., American Indians and Asians — is not statistically significant. Prisoner Statistics ceased publication in 1971 and no comparable official statistics have been issued since.

13. Prisoner Statistics, p. 1. No breakdown is given for Blacks sentenced for murder.

these, 107 or 57.8% are Black.[14] 65 of the 185 were sentenced in North Carolina, and of these 40 or 61.5% are Black and 5 or 7.7% are American Indian.[15]

The statistical evidence reviewed above demonstrates that the gross disproportion in the number of Blacks on whom the death penalty for murder has been imposed and executed is not an historical phenomenon associated with discriminatory laws and practices no longer in effect but that it currently persists undiminished. Turning then to the causes of the disproportion, we show in what follows that they exist 1) in the discriminatory administration of capital punishment, 2) in poverty produced by economic discrimination and 3) in other forms of racial discrimination that breed disobedience to white authority.

B. *The causes of the disproportion.*

1. *Racial discrimination in the administration of capital punishment.*

There is reason to believe that discrimination against Blacks in the administration of capital punishment for murder occurs at every stage of the criminal process. See, e.g., Bowers, pp. 104-06. The evidence is irrefutable of its existence in post-conviction proceedings. For it establishes that among those who receive a death sentence for murder, a Black is far more likely to be executed than a white.

A study of the execution rates of persons committed to death row for murder in North Carolina from 1909 to 1954 shows that while 43.8% of the whites were executed, the rate for Blacks was 62%. Johnson, Selective Factors in Capital Punishment, 36 Social Forces, 165, 169 (1957). A

14. See No. 1, *supra*.

15. See n. 2, *supra*.

study for New Jersey covering the years 1937-1961 concludes that, "while the probability that a white man convicted of capital murder will be sentenced to death is 3 out of 10, the probability for a Negro man is almost 5 out of 10." Bedau, Death Sentences in New Jersey, 19 Rutgers L. Rev. 1, 59 (1964). Again, a Pennsylvania study for the years 1914-1958 concludes: "It is the Negro felony murderer more than any other type of offender who will suffer the death penalty. Especially is this finding striking when we note that nearly three times more white (17.4%) than Negro (6.3%) felony murderers have their sentences commuted. Wolfgang, Kelly & Nolde, The Executed and the Commuted on Death Row, 53 J.C.L.C. & P.S., 301, 306 (1962).

The evidence is thus compelling that the disparity in the execution rate for Blacks as compared with whites has been and continues to be a product of racial discrimination, perhaps less blatant today than formerly, but no less operative. The evidence is likewise compelling that the degree of discrimination is not significantly affected by the substitution of a mandatory sentence for one discretionary with the jury, or vice versa.

In North Carolina, the death penalty for murder was mandatory until 1949 when the law was amended to permit an alternative life sentence upon the recommendation of the jury. In the 39 years from 1910 to 1949 when death was mandatory, 75.5% of those executed for murder were Black. In the 12 years from 1949 to 1961 when death was discretionary, the proportion of Blacks declined to 71.4%. Bowers, Table 3-11, p. 96. In 1973, *State v. Waddell*, 282 N.C. 431, 194 S.E. 2d 19, reinstated the mandatory penalty, which has since remained in effect under that decision or under the statute as amended by the legislature,

effective April 8, 1974. There have been no executions since *Waddell*. But of the 44 persons committed to death row for murder since that decision, 30 or 68.2% are non-white (26 Blacks and 4 American Indians) compared with 60% non-whites on death row in 1970 when death was discretionary. (See no. 2 and p. 6 , *supra*.)

In North Carolina then, it appears that the disproportion of Blacks both among those sentenced to death and among those executed is greater under mandatory than under discretionary sentencing.

Bowers, pp. 91-97, compares the executions for murder under mandatory and discretionary sentencing in four other states which have had experience with both. He finds that in New Jersey and Pennsylvania, as in North Carolina, the per cent of Blacks among the executed declined under discretionary sentencing while in Ohio and Virginia the per cent increased. He concludes that while, in all cases, the total number of executions declines under discretionary sentencing, the evidence "suggests that discretionary sentencing alone bears only marginal responsibilities for the arbitrariness and discrimination that has characterized the administration of capital punishment in recent years."

The petition for certiorari (pp. 28-44) demonstrates that a mandatory statute allows leeway for avoidance of the death penalty at each stage of the criminal process from indictment to executive clemency. The available evidence does not permit pinpointing the stages at which the exercise of discretion is most frequently swayed by racial considerations. See Bowers, pp. 72-75. However, the North Carolina, New Jersey and Pennsylvania studies reviewed above conclusively demonstrate the discriminatory treatment of Blacks in the post-conviction disposition of death sentences for murder. Since post-conviction proceedings are the same for mandatory as for

discretionary sentencing, the result of these studies applies to both procedures. Moreover, in the case of the North Carolina study, mandatory sentencing was in effect for 40 of the 45 years covered (1909-1954). These studies thus confirm the conclusion that the reinstatement of mandatory sentencing in North Carolina has no tendency to lessen racial discrimination in the administration of capital punishment.

2. *Economic discrimination against Blacks.*

There is a paucity of statistical information on the economic status of persons convicted of capital crimes. But the studies which have been made bear out the first-hand observations of men like the warden of Oregon's state prison that, "only the poor get executed. The wealthy never are." Bedau, Capital Punishment in Oregon, 45 Oregon L. Rev. 1, 13 (1965). For similar statements by others, see Bedau, in Rutgers L. Rev., op. cit., p. 27.

The North Carolina study discussed above found for the years 1940-1954 that while 20% of the gainfully occupied in the state were employed as farm laborers, foremen, and other laborers, 50% of those committed to death row were in this category. At the other end of the scale, professional, technical and kindred workers who formed 3.6% of the population were not represented on death row. And managers, officials and proprietors formed 7.3% of the whole population but only 2.2% of the population of death row. The study further found that during the same period, the mean years of schooling for the state's population as a whole was 7.47, while it was only 4.65 for those on death row. Johnson, op. cit., p. 168. Similar studies for New Jersey and Oregon yielded like results. See Bedau in Rugers L. Rev., op. cit., p. 26; Bedau in Oregon L. Rev., op. cit., p. 13.

Evidence is lacking to assign relative weights to the

factors which account for the high incidence of the poor among recipients of the death sentence. Their inability to secure the kind of skilled legal representation available to persons of means is obviously important. See Bedau in Oregon L. Rev., op. cit., p. 13. The high rate of crime among the poor also bulks large. As Justice Powell observed in *Furman*, p. 447 (dissenting opinion), "The 'have-nots' in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens."

Statistical confirmation of this observation is presented in Survey of Inmates of Local Jails 1972, Advance Report, prepared by the Federal Law Enforcement Assistance Administration (hereafter the "FLEAA Survey"). It shows that of 141,600 inmates of jails in 1972, 44% had annual pre-arrest incomes of less than $2,000, 55% of less than $3,000, and that only 10% had incomes in excess of the $9,255 U.S. median. 4 out of every 10 inmates in pretrial status were unemployed when committed, 3 of them for more than a year. 42% of the inmates were Black, almost four times their percentage in the population as a whole. FLEAA Survey, pp. 3, 4 and Table A, p. 16.

Poverty thus is a major correlate of crime. And while, as we later show, it does not alone account for the high crime rate among Blacks it plainly bears primary responsibility for that rate. But Black poverty is itself a consequence of racial discrimination.

For over one-third of the nation's Blacks, blackness is synonymous with poverty. In 1969, 35% of the Black population, as against 9% of the white Anglo population, had incomes below the poverty level, then officially defined as less than $3,000 a year. Moreover, the Black poor are poorer than the white. The "mean income deficit" of the former was $1,832 and of the latter $1,427. The extent of

Black poverty and the disparity between Black and white incomes also appears from the fact that in 1969 the per capita income of Blacks was $1,818 or 54% of the $3,838 per capita income of white Anglos. The discrepancy was even greater in North Carolina where the figure for Blacks was $1,151 or 46% of the $2,516 for whites. Perlo, Economics of Racism (International Publishers, N.Y., to be published Feb., 1975), Chap. III and Tables III-3 and III-IV.[16]

The comparative figures on unemployment provide a further index of Black poverty and of the Black-white differential in economic status. Over the past 25 years, the unemployment rate among Blacks has been twice that of whites. Thus in the decade 1964-1973, the rate for whites was 4.09% but 8.26% for Blacks. Perlo, op cit., Table VI-VII citing BLS Handbook of Labor Statistics, 1973. Unemployment among Black youth is far more severe. A report by the Twentieth Century Fund, Youth Unemployment: Crisis in the Cities (1971) describes it as follows:

> "As against a white adult unemployment rate of 5 per cent in March, 1971, the overall rate of Black teenage unemployment was 30.3 per cent — or six times greater. In the poverty areas it was 41.2 per cent. For Black adults between the ages of twenty and twenty-four, the unemployment rate was 16.5 per cent.
>
> "Even so, the official figures do not portray the extent of the problem. An additional number of ghetto jobless are never found by the enumerators. At the very least, 100,000 young Black people —a most conservative estimate—have given up hope and have stopped looking for jobs."

16. The data in Perlo referred to in the text are based on the U.S. Census, 1970.

The extent and depth of Black poverty relative to that of whites is a consequence of racial discrimination.

That there is discrimination against Blacks in employment is indisputable. It was recognized by Congress in enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, which established the Equal Employment Opportunity Commission. Eight years later, Congress passed the Equal Employment Opportunity Act, P.L. 92-261, providing for the judicial enforcement of Commission Orders. The House report on this legislation (H.Rep. No. 92-238, 1972 U.S. Code Cong. and Adm. News, pp. 2137, 2139-41) states:

> "[The Civil Rights Act of 1964] recognized the prevalence of discriminatory employment practices . . . which [were] found to pervade our system . . .
>
> "During the first 5 years of its existence, the Commission has received more than 52,000 charges. Of these, 35,455 were recommended for investigation. Of this number, 56% involved complaints of discrimination because of race . . .
>
> "The number of charges is increasing. The incidence of discrimination does not appear to be waning.
>
> "The impact of the Commission's inability to obtain relief from employment discrimination is reflected in an examination of statistics showing the distribution of minorities in occupational groups. While the tables show some improvement since 1964, minority groups are not obtaining their rightful place in our society. . .[17]

17. Discrimination in employment is reflected even more sharply in the wage differentials between Black and white males in the same occupation or with the same educational qualifications. In both cases, Blacks, on the average, are paid one-third less than their white counterparts. Perlo, op. cit., chap. III and Table III-7.

> "Enactment of this bill will not automatically end employment discrimination in this country. The bill offers no panaceas or guarantees of success."

Again, the 1974 Economic Report of the President accepts as a matter of course both that there is a prevailing Black-white wage differential that is racially discriminatory and that the differential is a source of profit to employers. The Report states (pp. 151-52, emphasis supplied:)

> "First, the American economy is highly competitive, and business firms whose owners or white workers have *less* discriminatory attitudes toward blacks will be likely to employ more blacks. These firms prosper if blacks receive lower wages. When such firms expand, the demand for black workers increases and the discriminatory differential *declines*."

It follows from what has been said that: 1) the disproportionate number of Blacks who receive the death sentence is, in part, a reflection of the high rate of crime, capital offenses included, among them; 2) the high crime rate, in turn, reflects the high rate of Black poverty; 3) the high rate of poverty among Blacks is a consequence of racial discrimination. Hence, to the extent that the high rate of Black poverty accounts for the disproportionate number of Blacks who commit capital crimes, the disproportion is a consequence of racial discrimination.

3. *Racial discrimination breeding disobedience to white authority.*

The relevant statistics indicate that poverty does not bear exclusive responsibility for the high rate of crime among Blacks. Blacks constitute 11.1% of the U.S. population

and 28.3% of all those below the official poverty level.[18] If poverty were the sole cause of the high crime rate among Blacks, one would expect them to constitute approximately 28% of those charged with or convicted of crime. Yet, as has been shown above, Blacks make up 42% of the inmates of jails. The fact that their proportion among the latter is half again as great as their proportion among the poor strongly suggests that factors in addition to poverty share a measure of responsibility for the high Black crime rate.

An important additional factor is a further reflection of the fact that, "Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years." *Milliken v. Bradley*, ——U.S.——, 41 L. Ed. 1069, 1131 (dissent of Justice Marshal). One consequence of these attitudes is described in Silberman, Crisis in Black and White (1964), pp. 50-53:

> "And the odds are small indeed that a Negro child can grow up without being abused or patronized, without being convinced by a hundred big and small humiliations, that he has no worth and no chance . . .
>
> "And if the child should grow up somehow without confronting prejudice and discrimination directly, he meets it soon enough as an adult . . . The police are an ever-present threat; there is hardly a Negro community in the United States which does not regard the local police with suspicion, if not with hate . . .
>
> "The occasional acts of police brutality, however, hurt less than the constant flow of petty indignities — indignities that seem to demonstrate, a dozen times a year, that no matter what the

18. 1970 Census, Summary C, Table 95 (preliminary volume).

> Negro does, no matter what he achieves, no matter what he is, the white world will never accept him.
>
> "This sense of rejection by American society, a sense which dominates the lower-class Negro's life, tends to destroy his feeling of responsibility to law and authority. Law and authority are always white and middle class and always seem designed to keep the lower-class Negro in his place."

To the extent then that a lack of a "feeling of responsibility to law and authority" accounts for the high rate of crime among Blacks, that too is a product of racial discrimination.

C. *The weight and constitutional effect of the evidence of racial discrimination.*

It has been demonstrated above that capital punishment for murder is imposed and executed in North Carolina and elsewhere in a manner that discriminates against Blacks. We have identified the principal sources of the discrimination. It resides within the criminal process and is definitely identifiable in the post-conviction disposition of death sentences. It resides in economic discrimination, resulting in poverty far deeper and more pervasive than exists among whites. It resides also in the multiform practices of white supremacy that affront Black dignity and erode respect for and obedience to white authority. It has also been shown that racial discrimination in the administration of capital punishment exists without significant difference of degree under both mandatory and discretionary sentencing procedures.

It will be said that the proof here adduced is not conclusive. But proof of the causation of a complex social phenomenon can never attain that degree of certainty. Surely, the proof is sufficient to establish a prima facie case

and shift the burden to those who deny that racial discrimination is the cause of the disproportion in the number of Blacks on whom capital punishment is imposed and executed. The proof here is at least as cogent as that required to make out a prima facie case of racial discrimination in the selection of a jury. *Alexander v. Louisiana*, 405 U.S., 625, 630-32 and cases there cited. Certainly, no more should be required where lives are at stake.

Justice Douglas recently wrote that, "Cases which have come to this Court depict a spectacle of slavery unwilling to die." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 445. Responsibility for the prolongation of its life rests with every institution of white society, social, economic and governmental, not excluding this Court. See, e.g., *Civil Rights Cases*, 109 U.S. 3; *Plessy v. Ferguson*, 163 U.S. 537; *Grovey v. Townsend*, 295 U.S. 45.

Capital punishment, in the inequality of its impact upon Blacks, presents the Court with another manifestation of the spectacle to which Justice Douglas referred.

It will be said, however, that the argument cuts too deep and if carried to the limit of its logic would invalidate imprisonment along with death as an unconstitutional punishment. See *Furman*, p. 447 (dissent of Justice Powell). But there is a qualitative difference between the two, a difference with constitutional dimensions as wide as the distance from life to death.

Consider the savage results of the reinstitution of the mandatory death penalty in North Carolina:

1. In the 22 months following *Waddell* 65 persons (as of November 29, 1974) have been committed to death row (44 for murder) compared with 10 for the full two year period 1969-1970 when death was discretionary. See n. 2, *supra*, and Prisoner Statistics, Tables 7 and 7a, pp. 21, 23.

2. 40 of the 65 are Black. Of these, 10 (25%) were 20 years of age or less when committed; 27 (67.5%) were under 25, and 31 (77.5%) were under 30.[19] See n. 2, *supra.*

3. Data on prior criminal records are available for 53 of the 65. 29 (54%) of these have no previous record.[20] Of those convicted of murder, data are available for 37, of whom 21 (56.7%) have no previous record. See no. 2, *supra.*

3. "[C]riminals spared from death who are released after a term of years have better records on the whole than released prisoners in general." Wechsler in Symposium on Capital Punishment, 7 N.Y.L. Forum, 250, 254 (1961). A murderer tends to be a model prisoner who "is not nearly so great a danger to the prison community, nor to the outside world when he is paroled or pardoned, as are many other classes of prisoners, who are regularly released after serving much shorter terms of imprisonment." Sellins, the Death Penalty; Report for ALI Model Penal Code Project (1959).

4. On past performance in North Carolina, of the 26 Blacks committed for murder, 16 (62%) will be executed if the Court does not invalidate their sentences. See n. 2, *supra.* and Johnson, op. cit., p. 169.

It thus appears that a majority of those slated for execution for murder in North Carolina are young Blacks, the cruelest victims of racist economic discrimination, with no previous criminal records who, if allowed to live, would be unlikely to commit another felony. It is submitted that a

19. They were, of course, still younger when the crimes were committed.

20. Of the 113 persons *executed* in North Carolina in the years 1940-1954, 49.6% had no previous record. Johnson, op. cit., p. 169. For similar findings elsewhere, see Carter and Smith, Death Penalty in California, 15 Crime & Delinquency 62, 68-69 (1969).

system of punishment that discriminates by selecting such persons for execution, denying them an opportunity for rehabilitation, is cruel and unusual within the meaning of the Eighth Amendment and violates the equal protection clause of the Fourteenth.

CONCLUSION

The judgment below, insofar as it affirmed the death penalty, should be reversed.

Respectfully submitted,

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